

Binding Death Benefit Nominations ('BDBN')

BDBNs are a useful tool for SMSF members to direct who is to receive their death benefit. We discuss below some key current issues relating to BDBNs.

Key issues

BDBNs are binding on the trustee

SMSF trustees must follow their SMSF deed. Typically, an SMSF deed empowers a trustee to pay a death benefit to one or more dependants or to the member's legal personal representative ('LPR', usually, the executor of the deceased member). In the absence of a BDBN, this choice is left to the trustee's discretion.

Note that some SMSF deeds have BDBN provisions that have unnecessary hurdles or are possibly void for uncertainty such as 'it will only be valid if it is to the trustee's satisfaction'. It is therefore important that you carefully review the BDBN provision and make sure it is clear and effective.

Key planning tool

BDBNs are an important succession planning tool as they lock in a member's death benefit directions. For example, a BDBN can direct the trustee to pay the member's death benefit to their spouse and, if no spouse, to their children equally. Alternatively, a simple BDBN may direct the member's death benefit be paid directly to their LPR.

Must a BDBN expire within three years?

Most SMSF deeds drafted after mid-1999 include a BDBN provision however not all SMSF deeds are the same. In particular, some SMSF deeds expressly provide a three year expiry date to a BDBN whereas some allow an indefinite (or non-lapsing) BDBN.

If the provision is not clear that a BDBN lasts for an indefinite period, then the SMSF deed might be construed as being limited by the three year rule in the *Superannuation Industry (Supervision) Regulations 1994* (Cth) ('SISR'). (See *Donovan v Donovan* [2009] QSC 26.)

Thus, for a BDBN provision to last indefinitely, the SMSF deed must be express and clear on this point.

DBA Lawyers considers that an appropriately drafted SMSF deed can allow a BDBN to last indefinitely as

does the ATO in SMSFD 2008/3. However, as the legislation is not entirely clear, there is some risk that this view could one day be challenged.

Thus, we recommend that where an indefinite BDBN is made that it nevertheless gets updated every three years to minimise such risk. In this scenario, a member who loses legal capacity will still have a BDBN beyond the three year period. If they were subject to a three year expiry, they would not have a BDBN and may be exposed.

'Hard wired' SMSF deeds

An alternative to a BDBN is to have the SMSF deed 'hard wired' such that the deed itself binds the trustee to pay death benefits in a certain way. (Some SMSF deeds call this a death benefit rule.)

A hard wired deed is one option to overcome the above risk. However, these require careful tailoring to ensure the member's directions are clear and effective and should only be drafted by an experienced SMSF lawyer. Moreover, the member's will and related estate plans should also be checked to ensure they are consistent with the member's instructions. This naturally results in considerably more time and costs compared to a BDBN. (Many BDBNs these days are simply based on a standard form template.) As a consequence, we find that most clients prefer a BDBN unless they are willing to pay for the greater certainty that comes with a hard wired deed.

Refer to <http://www.dbalawyers.com.au/smsf-succession-planning> for more information on DBA Lawyers' offering on hard wired deeds.

Common traps

Drafting the BDBN

The actual wording used in a BDBN is very important. In *Donovan's* case the court found that the member's written notification to the SMSF trustee did not constitute a BDBN as the wording did not convey a binding direction but a mere wish. Naturally, the wording of each BDBN should therefore be clear and consistent with the member's instructions.

Conflicts between different documents

It is essential that the directions in a member's BDBN do not conflict with the member's pension documents, will and other estate plans.

A situation where a conflict commonly occurs is between a member's 'reversionary' pension nomination and their BDBN. On one hand, their pension may be set to be reversionary to their spouse but their BDBN may require payment to their LPR.

Such conflicts are best avoided by reviewing a member's BDBN in conjunction with their pension documents and overall estate plans.

SMSF deeds

The specific provisions of the deed are vital to ensure that a BDBN can be put into place and also last indefinitely.

Further, since SMSF deeds are updated on a regular basis, it is important to ensure that BDBNs are also reviewed to ensure they are still effective under the updated SMSF deed. For instance, the updated deed may have different BDBN requirements.

For this reason, we generally recommend that a new BDBN be completed following each deed update.

Successor directors

The control of an SMSF is also of paramount importance to ensure a person's directions will be carried out, even if there is a BDBN or hard wired deed in place.

A corporate trustee's constitution should contain adequate provisions to allow succession of directors for that company. Tailored documentation needs to be drafted to allow for smooth succession as the successor directors to the corporate trustee will be required to oversee the implementation of any BDBN

or death benefit direction. A successor director can assist in this oversight role to look after the deceased's interests. This is usually relevant where the deceased is survived by a second or subsequent spouse.

Refer to <http://www.dbalawyers.com.au/smsf-succession-planning> for more information on DBA Lawyers' offering regarding SMSF succession planning.

DBA for your in-house training

DBA Lawyers regularly conduct in-house training. We can tailor training for your needs. Below are some sample questions from a recent session on conditions of release.

Q1 — Ethan is a doctor and works for several hospitals. He has just attained age 55. He quits working for one of the hospitals but still works for the others. Is he allowed to withdraw his superannuation benefits? If you answered yes, in what form may he withdraw them?

Q2 — Lachlan is a wealthy executive, aged 57. He quits his job in order to spend more time with his possessions. He has no intention of ever working again. Is he allowed to withdraw his superannuation benefits? If you answered yes, in what form may he withdraw them?

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This is one 'in-house asset' that the ATO doesn't mind you having!

DBA Network — Quarterly SMSF Seminars

DBA Network's next round of Quarterly SMSF Seminars are fast approaching. The March round presented at seven locations around Australia covers SMSF succession planning (including BDBNs, trustee succession, etc), SMSF borrowing and a general SMSF update.

Our next SMSF Core Course is on the 13-15 April in Melbourne. You can become an SMSF expert and obtain your RG146 recognition.

Our next Online SMSF Update is on 29 April. Keep up to date with the latest SMSF news in 1.5 hours each quarter with live online training.

For further information, or to register, please visit www.dbanetwork.com.au

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